THE PROPOSAL TO LEGALIZE THE SECONDARY BOYCOTT. — The report of the Commission on Industrial Relations proposes *inter alia* to legalize that horror of our legal theorists, the secondary boycott.[1] Injunctions have generally issued against secondary boycotts,[2] many upon the theory of protecting the right of the plaintiff to have a free market for his labor, capital, or wares.[3] That his market may be lawfully impaired by competition is indisputable, but he does have this right in a certain sense, — a right not to be so injured by unlawful conduct. What is unlawful conduct remains to be considered. The following facts, substantially those of a late New Jersey case,[4] are illustrative of what has been generally regarded as illegal. The plaintiff corporation, A., announces its intention to abrogate its former policy of running union shops only, whereupon its employees, members of B. union, join with affiliated unions, C., in withdrawing their custom from A. and from D., retailers who deal with A. They also distribute circulars to persuade members of the public, E., not to deal with A. or D., thereby reaching A. indirectly.

A few decades ago courts were first confronted with our unprecedentedly complicated industrial conditions and the unprecedented legal problems which necessarily accompanied them. What was to be their guiding star on this uncharted sea? Many chose the principle that all harm intentionally caused is actionable unless justified.[5] Historically,

---

[1] A majority of the Commission seem to favor the recommendation. See Report of Commission on Industrial Relations, pp. 136, 281, 302, 383. For dissent, see p. 407.

[2] The term "secondary boycott" is here used to describe the situation where a boycotting combination brings pressure to bear on parties not directly involved in the dispute, in order to reach the plaintiff; in other words, what has been called "conscription of neutrals." See 20 HARV. L. REV. 448; 28 *id.* 696. This involving of outside parties is often considered the decisive element. See article by Wm. H. Taft in MCCLURE'S MAGAZINE, June, 1909, p. 204, cited in Pierce *v.* Stablemen's Union, 156 Cal. 70, 76, 103 Pac. 324, 327. For the origin of the word "boycott," see State *v.* Glidden, 55 Conn. 46, 76.

[3] Burnham *v.* Dowd, 217 Mass. 351, 104 N. E. 841; Pickett *v.* Walsh, 192 Mass. 572, 78 N. E. 753; Barr *v.* Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881; Delz *v.* Winfree, 80 Tex. 400, 16 S. W. 111; Hey *v.* Wilson, 128 Ill. App. 227; Walsh *v.* Ass'n of Master Plumbers, 97 Mo. App. 280; Lohse Patent Door Co. *v.* Fuelle, 215 Mo. 421, 114 S. W. 997; Casey *v.* Cincinnati Typographical Union, 45 Fed. 135; My Md. Lodge, etc. *v.* Adt, 100 Md. 238, 59 Atl. 721; Loewe *v.* Cal. State Fed. of Labor, 139 Fed. 71; Metallic Roofing Co. *v.* Jose, 12 Ont. L. R. 200; Mathews *v.* Shankland, 56 N. Y. Supp. 123. See 20 HARV. L. REV. 434, 438, 448; 44 AM. L. REG. (n. s.) 465, 470 *ff;* 17 GREEN BAG 210, 215 *ff;* 22 HARV. L. REV. 458. *Contra*, Parkinson *v.* Building & Trades' Council, 154 Cal. 581, 98 Pac. 1027; Pierce *v.* Stablemen's Union, 156 Cal. 70, 103 Pac. 324; Lindsay & Co., Ltd. *v.* Mont. Fed. of Labor, 37 Mont. 264, 96 Pac. 127; Bender *v.* Local Union, etc., 34 Wash. L. Rep. 574; Macauley *v.* Tierney, 19 R. I. 255, 33 Atl. 1; Scottish Co-op. Soc. *v.* Glasgow Fleshers Ass'n, 35 Sc. L. R. 645.

[4] A. Fink & Son *v.* Butchers' Union, 95 Atl. 182 (N. J.). In this case, however, the defendants distributed circulars containing the false statement that the plaintiff had locked them out and also displayed a red skull and crossbones. In so far as the former act was libelous, or the latter carried a threat of violence, they were of course subject to injunction.

[5] Walker *v.* Cronin, 107 Mass. 555, 562; Martell *v.* White, 185 Mass. 255, 258, 69 N. E. 1085, 1086; Delz *v.* Winfree, 80 Tex. 400, 404, 16 S. W. 111, 112; Tuttle *v.* Buck, 107 Minn. 145, 149, 119 N. W. 946, 947; De Minico *v.* Craig, 207 Mass. 593, 598, 94 N. E. 317, 319; Moores *v.* Bricklayers' Union, 23 Oh. Wkly. Bull. 48, 52;

the tendency of the law from early times had been otherwise. It had laid the primary emphasis upon the overt act, by which and according to which the various forms of action and theories of recovery were evolved. In an ever increasing number of cases, however, the defendant's state of mind came to be considered material after the court had taken its bearings by reference to the defendant's act.[6] The new theory, which makes its great primary classification one of injuries which are intentional and those which are not, emphasizes an element which the law has hitherto hesitated to deal with. It is an historical anomaly. On this ground it might be urged that this principle has no place in the common-law system. If we reject it, it would follow in the case above stated that all B. and C. have done is to cease dealings with A. and D., and to persuade E. to do likewise, — acts which are *primâ facie* innocent, just as acts of violence, defamation, or fraud are certainly *primâ facie* illegal.

It seems unlikely, however, that a principle so fruitful, and so flexible amid changing industrial conditions, will fail to gain a foothold in Anglo-American law, even if it cuts across the grain of our whole legal growth. Yet even if it is adopted no cause of action need arise under the facts above stated. There has been much discussion as to when desire to injure another should render unlawful an act otherwise lawful.[7] In so far as it is possible to generalize, it seems an ideal toward which the law might well develop to attach the consequence of illegality to any intentional injury whenever the desire to injure the plaintiff is predominant.[8] Yet in the case we are considering, the attention of the defendants is reasonably directed toward strengthening themselves economically; the loss to A. and D. is incidental only.[9] Whence, then, comes the illegality? The doctrine that it enters through the mysterious properties of the word "conspiracy," which render combined action illegal where individual action would be lawful, has not much support in modern authority, the tendency being to recognize that combination is only material in that it increases the capacity for doing injury.[10] Liability

---

Parkinson *v.* Building & Trades' Council, 154 Cal. 581, 603–604, 98 Pac. 1027, 1036. See POLLOCK, TORTS, 8 ed., 21; 20 HARV. L. REV. 262; 26 *id.* 259.

[6] Nothing less than the whole common law can prove or disprove this statement. The following cases, however, are suggestive. Weaver *v.* Ward, Hob. 134; Fletcher *v.* Rylands, L. R. 1 Exch. 265, L. R. 3 H. L. 330; Brown *v.* Collins, 53 N. H. 442.

[7] See Allen *v.* Flood, [1898] A. C. 1, 92, 93, 125, 172, 173; Passaic Print Works *v.* Ely Walker Dry Goods Co., 105 Fed. 163, 166; May *v.* Wood, 172 Mass. 11, 14, 51 N. E. 191, 192; Chesley *v.* King, 74 Me. 164, 172; 18 HARV. L. REV. 411; 20 *id.* 451. Upon turning to the mental element we are met with a confusion in terms. The defendant makes certain physical motions with the expectation or hope that certain consequences will follow. Such consequences of a certain degree of remoteness are called his intention, while consequences one degree more remote have often been called his motive, but there is no sufficient agreement in the books on the application of these terms to render the distinction illuminating.

[8] This is more nearly the civil-law conception of "abuse of right" than a common-law tenet. *Cf.* authorities collected in AMES, CASES ON TORTS, 3 ed., 882 n., with those in n. 62 L. R. A. 683 *ff.*

[9] *Cf.* "Le motif de leur (des ouvriers) conduite pouvait être uniquement d'obéir aux règlements et de sauvegarder des intérêts de l'union ouvrière." Gauthier *v.* Perrault, 6 Quebec Q. B. 65, 89.

[10] See Scott Stafford Opera Co. *v.* Minneapolis Musicians Ass'n, 118 Minn. 410, 414, 415, 136 N. W. 1092, 1094; Macauley *v.* Tierney, 19 R. I. 255, 264, 33 Atl. 1, 4;

is accordingly rested on some other theory. It is hard to see how the mere indirectness of the methods used has any significance *per se*. That may, however, be a strong indication that the defendant's predominant state of mind is vindictive, which, as above suggested, should turn the balance against him.[11] The less direct a boycott is, the less likely it is to be effective,[12] and if, for instance, the present scheme is not calculated to reach A., D. might well claim an injunction on the ground that he was being injured from mere spite. But no such claim could here be made, for A. is complaining because the method adopted is too effective.

Any discussion of legislation aiming at the legality of the secondary boycott must not overlook the fact that psychologically the principle that intentional injury is *primâ facie* actionable bears peculiarly hard on the defendant. It concentrates attention on the plaintiff's wrong and makes it a matter of secondary consideration what overt act the defendant has done. The defendant may still justify, but he must convince a mind that has approached the problem from a starting point unfavorable to him. Furthermore, it is scarcely possible to deny that combinations of workmen have been treated more severely by the courts than combinations of traders or employers.[13] This is unjustifiable theoretically, and the advantage that waiting power generally gives capital in competition with labor does not render it more defensible practically. If the law is not to assume closer supervision over the incidents of the industrial struggle through compulsory arbitration, to equalize the contest by withholding legal or equitable actions which in practice are chiefly serviceable to one side only seems most in consonance with the underlying spirit of the common law.

THE DOCTRINE OF THE PRESUMPTION OF A LOST GRANT AS APPLIED AGAINST THE STATE. — In a suit in equity to confirm title, brought by a grantee from the state under a 1907 patent, the Supreme Court of Mississippi recently held that a grant from the state to the defendant would be presumed from the latter's peaceful and uninterrupted possession for over twenty years. *Caruth* v. *Gillespie*, 68 So. 927 (Miss.).[1] The

Lindsay & Co., Ltd. *v.* Mont. Fed. of Labor, 37 Mont. 264, 273, 96 Pac. 127, 130; Mogul Steamship Co. *v.* McGregor, 23 Q. B. D. 598, 616; Sweeney *v.* Coote, [1906] 1 Ir. Ch. 51, 109.

[11] The vindictive nature of the action in some cases has amply warranted enjoining it. Quinn *v.* Leathem, [1901] A. C. 495; Miller *v.* Collet, 32 New Zealand L. R. 994; Martell *v.* Victorian Coal Miners' Ass'n, 25 Australian L. T. 40, 120. Cases are also to be distinguished where breach of contract is induced. Temperton *v.* Russel, [1893] 1 Q. B. 715; Doremus *v.* Hennessy, 176 Ill. 608, 52 N. E. 924; Jackson *v.* Stonfield, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14. See New Jersey Ptg. Co. *v.* Cassidy, 63 N. J. Eq. 759, 763, 53 Atl. 230, 232. Violence is of course out of the question. Beck *v.* Ry. Teamsters' Union, 118 Mich. 497, 77 N. W. 13. And fining one not affiliated with the defendants must generally be illegal. March *v.* Bricklayers', etc. Union, 63 Atl. 291, 79 Conn. 7.

[12] See MITCHELL, ORGANIZED LABOR, 289.

[13] See Lewis in 44 AM. L. REG. (n. s.) 491–492; "Report of Commission on Industrial Relations," 135, 383; 28 HARV. L. REV. 697, n. 5.

[1] A more complete statement of the facts of this case will be found on p. 106 of this number.